



PUBLIC SCHOOLS OF NORTH CAROLINA

DEPARTMENT OF PUBLIC INSTRUCTION | Mark Johnson, *Superintendent of Public Instruction*

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July 3, 2019

VIA HAND DELIVERY and E-MAIL

J. Mitchell Armbruster, Esq.
Smith Anderson, L.L.P.
150 Fayetteville Street, Suite 2300
Raleigh, North Carolina 27601
marmbruster@smithlaw.com

RE: Response to your June 24, 2019 Protest Letter

Dear Mr. Armbruster:

Pursuant to 09 NCAC 06B.1102, this letter constitutes my response on behalf of the North Carolina Department of Public Instruction (the "Department") to your protest letter dated June 24, 2019, which you submitted on behalf of your client, Amplify Education, Inc. Contrary to your assertion that your client's protest letter and request for a protest meeting were timely submitted, the facts and law show otherwise. That is, your protest letter and request for a protest meeting were not submitted within 15 *calendar* days from the date of contract award, rendering your submission procedurally defective.

The North Carolina Administrative Code (the "Code") governs protest procedures for contract awards, outlining the step-by-step process and timeline by which a protesting vendor or counsel for said vendor must abide. The Code states, in pertinent part, "[t]he offeror shall deliver a written request for a protest meeting to the agency head or his designee within 15 calendar days from the date of the contract award." 09 NCAC 06B .1102(a)(1).

As you acknowledge in your client's protest letter, the Department awarded the Read to Achieve contract to Istation on June 7, 2019. The fifteenth calendar day after June 7, 2019 was June 22, 2019 – a time computation that properly excludes June 7 itself. You did not submit your client's protest letter and request for protest meeting until June 24, 2019, failing to meet the June 22, 2019 deadline. While you may assert that Rule 6 of the North Carolina Rules of Civil Procedure applies here, it does not. The reason that Rule 6 does not apply is twofold. First, 09 NCAC 06B.1102(1) makes it clear that the Rules of Civil Procedure apply to matters before a *hearing officer* unless another rule or statute is more specific (emphasis added). Your request for a protest meeting is not a matter before a hearing officer. Even if it were – and pursuant to this same subsection within this Rule – there is a more specific rule within this section of the Code that governs the bid protest timeline with specificity, which is 09 NCAC 06B.1102(1). Secondly, 09 NCAC 06B.1105(7) states that Rule 6 does govern time computations for *contested cases*, but your client's request for a protest meeting falls outside of the definition of a contested case (emphasis added).

OFFICE OF THE NORTH CAROLINA SUPERINTENDENT

Mark Johnson, *Superintendent of Public Instruction* | mark.johnson@dpi.nc.gov
6301 Mail Service Center, Raleigh, North Carolina 27699-6301 | (919) 807-3430 | Fax (919) 807-3445

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Moreover, deference must be given to the most specific governing authority as it relates to protest procedures for an award of contract and, as mentioned above, there happens to be a rule that speaks directly to the timeline governing protest procedures with specificity – Rule 09 NCAC 06B.1102 – which states in no uncertain terms that the protest paperwork must be submitted by the protesting vendor within “15 *calendar* days” from the date of the contract award (emphasis added). The very use and incorporation of the word “calendar” before the word “day” is not haphazard, and it provides a level of specificity that cannot be ignored by a protesting vendor such as your client. This is because the Code is allowed and even expected to be more specific than our General Statutes. Were the Code not as specific as it is today, agencies and protesting vendors alike would not have clarity as to how to proceed when it comes to protests of public contract awards.

For the reasons stated above, the submission of your client’s written protest and request for a protest meeting was untimely, procedurally defective, and must therefore be dismissed. However, as the head of the Department, I am willing to provide you with an opportunity to discuss this matter in person. With that said, I expressly reserve the right to respond substantively and with line-by-line specificity to the misinformation in your protest letter. I cannot emphasize enough the fact that the Department followed all laws, policies, and rules related to the RFP and contract award.

Please contact the Department’s general counsel, Jonathan Sink, at jonathan.sink@dpi.nc.gov to schedule this meeting.

Sincerely,

A handwritten signature in dark ink, appearing to read "Mark R. Johnson", with a stylized flourish at the end.

Mark R. Johnson
NC Superintendent of Public Instruction